In The

Supreme Court of the United States

October Term, 1942

No. 664

W. L. NIX

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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W. L. NIX

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PETITION

To the Honorable, the Supreme Court of the United States:

Comes now petitioner, W. L. Nix, appellant below, and petitioning for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, respectfully shows:

Statement of the Case

On February 16th, 1937, there was returned to the United States District Court for the Northern District of

Texas, Dallas Division, Indictment No. 8920, charging petitioner in 34 counts with having wilfully and unlawfully attempted to defeat and evade payment of the taxes on gasoline manufactured by him, and with having wilfully and unlawfully failed and refused to pay such Taxes, in violation of Section 3412, Title 26, U. S. C. A., and No. 8922, charging petitioner and Sid B. Pope with having violated the same statute, laws, and regulations thereunder, in 14 Counts.

The even counts of each of these indictments attempt to charge the wilful and unlawful failure and refusal to pay taxes due, and the odd counts charge the wilful and unlawful attempt to defeat and evade such payments. Each of the odd counts of the indictment, while attempting to charge such attempt to defeat and evade payment of the taxes due, charge also the wilful and unlawful failure and refusal to pay same, thereby charging two distinct and separate offenses in the same Counts of the indictments. Each and every count of the indictments allege that the gasolene manufactured and sold by petitioner, upon which the taxes became due, were sold to persons, not within the excepted classes to whom gasolene might be sold tax free, towit, "a producer of gasoline", but did not plead such gasolene was not sold to numerous of the other excepted classes of persons.

Appellant seasonably and timely filed his general and special demurrers to each of the indictments, and moved to quash each of them and each count of them alleging, among

other things, that the odd counts of each of them were duplicitious, in that each of such odd counts attempt to charge two offenses, towit, the wilful and unlawful attempt to defeat and evade the payment of the taxes alleged to have been due, and the wilful failure and refusal to pay such taxes; urging also in his said demurrer, petitioner set out that there was a fatal misjoinder of offenses in each of said indictments, in that Counts 1 to 14 allege such violation by petitioner while operating Texas Refinery; Counts 15 and 16 charge such violations operating Texas Refinery, Adams Oil Co., lessee; counts 17 and 18 charge such violations operating A. J. Adams Oil Co., Texas Plant; counts 19 to 22, inclusive, charge such violation while operating Keystone Refinery; counts 23 and 24 charge such violations operating Keystone Refinery, Adams Oil Co., lessee; counts 25 and 26 charge such violations by operation of Triangle Refinery, Adams Oil Co., lessee; counts 27 and 28 charge such violations while operating A. J. Adams Oil Company, Triangle Refinery; and counts 31 to 34, inclusive, charge such violations while operating Adams Oil Company, Big Sand Plant, with no allegations (which also were not proved during the trial) of common ownership and control, and petitioner alleged in his said demurrer and motion to quash that each of the violations alleged to have been committed by petitioner in the operation of the separate and distinct refineries, if committed at all, were separate and distinct offenses, and not so connected together as would permit their prosecu-

tion in one indictment, all of which were by the Court overruled, and petitioner then and there excepted. At the close of the Government's case upon the trial, and when both sides had closed, petitioner renewed each of his demurrers and motions to quash, which were again overruled, and to which petitioner again duly excepted.

The case was called for trial on June 14th, 1937, the indictments, Nos. 8920 and 8922, were consolidated as to petitioner, since that at a previous term of this Court, Sid B. Pope had entered his plea of guilty to the offenses charged in cause No. 8922, and had been given eighteen months in the United States Penitentiary at Leavenworth, Kansas, suspended for two years, conditioned upon good behavior, and only petitioner remained to be tried. On the 16th day of June, 1937, petitioner was convicted on each and every count of the indictments, consolidated, and was by the Court sentenced to pay a fine of $10,000.00 on counts 2, 4, 6, 8, and 10, and to serve Five years in the United States Penitentiary at Leavenworth, Kansas on the remaining counts, generally, the five years to be suspended, conditioned (1) good behavior; (2) the payment of $5,000.00 of the fine within 90 days; (3) remaining $5,000.00 in 18 months; (4) the payment to the Government of the taxes alleged to be due (some $84,000.00 plus penalties and interests) within eighteen months.

At the close of the Government's case, after having renewed his general and special demurrers and motions to quash, as above set out, petitioner moved for an instructed

verdict of not guilty, for the reasons that (1) there was a fatal variance between the allegations and proof, in that it was alleged in the indictment that petitioner sold gasolene set out in the indictment to persons not within the excepted classes, towit, "producers of gasoline", whereas, in truth and in fact, each and every sale alleged to have been made by petitioner upon which he owed taxes had been sold to "producers of gasoline" for resale, and such transactions were exempt from the payment of the taxes; and (2) because the law under which petitioner was being tried (Sec 3412, Title 26, U. S. C. A.) exempted petitioner from the payment of taxes on these sales. Although each and every witness produced by the government to testify of the sales of gasolene upon which taxes alleged to have been due, and of which petitioner was charged with having attempted to defeat and evade and with having wilfully failed and refused to pay, testified such gasolene had been sold to "a producer of gasoline" for resale, the Court overruled the motion, which was renewed when defendant had rested his case, and when both sides had closed, which was also overruled, to all of which appellant then and there duly excepted; the evidence tended to show that petitioner had collected certain of the taxes from the purchasers thereof when the gasolene was sold which were not remitted to the Government but, if he had so done, that would constitute a separate and distinct offense, not charged in the indictment, to the offenses for which petitioner had been indicted and was being tried.

Upon the trial of the case, the Government tendered as certain of its witnesses, Ben P. Pipgrass, E. S. Horner, Ballard Clark, John Stephens, and E. P. Harvey, being the witnesses who had purchased, or had represented the purchasers, of all the gasoline alleged in the indictments, consolidated, to have been sold by petitioner upon which he was alleged to have attempted to defeat and evade payment of the taxes due thereon and which he was alleged to have wilfully failed and refused to pay, and having been examined on voir dire by petitioner under permission of the Court, all testified that they were "producers of gasoline" or represented "producers of gasoline" in their respective purchases of gasoline from petitioner, and that the gasoline so purchased was purchased for resale; petitioner objected to the testimony of each of these witnesses, for the reason that they were "producers of gasoline", that the gasoline purchased from petitioner by them was purchased for resale, and, therefore, these transactions were exempt from the payment of such taxes by petitioner, such testimony was irrelevant, immaterial, prejudicial and contrary to the allegations contained in the indictment, which objections were by the Court overruled, and to which action the defendant then and there excepted.

Also upon the trial of this cause, the Government called as one of its witnesses, Sid B. Pope, joint defendant with petitioner in cause No. 8922, consolidated, who testified that he was head bookkeeper and auditor for petitioner for a while; that he had in his possession certain books

and records belonging to petitioner, that his duties only was to keep books and serve as auditor for petitioner, that his duties went no further, and that he had nor did he exercise any control over the business or policies of the companies operated by petitioner. Having been permitted to be examined by petitioner on voir dire, he testified further that petitioner did not give him his permission to take and produce such books and records, and that no search warrant had been issued to seize them, he nevertheless was permitted, over the objection of petitioner, to testify that certain of the books and records he had in his possession showed certain gasoline taxes due by petitioner that had not been paid.

Petitioner was unable to meet the conditions of his suspended sentence, and after various delays and extensions of time within which he might do so, a part of which time, petitioner was a fugitive from the jurisdiction of the Court, he voluntarily appeared before the Trial Court on April 23rd, 1942, admitted his inability to so comply, and was sentenced to two years confinement in the United States Penitentiary at Leavenworth, Kansas, with no fine, no provisions as to the payment of taxes, and without further suspended sentence; that immediately upon the so sentencing of petitioner, the Honorable T. Whitfield Davidson, United States District Judge for the Northern District of Texas, who had presided over petitioner's trial, and who had meted out all sentences, left for Washington, D. C., for an extended time to hold Court in the District of Colum-

bia; that appellant, in due time after the sentence imposed on April 23rd, 1942, appealed his case to the United States Circuit Court of Appeals for the Fifth Circuit, and consulted with and received orders from that Court with reference to the perfection of his appeal instead of the Trial Court, who was away; that in due time and within the time allowed him by the Circuit Judges, he prepared and filed his bill of exceptions and assignment of errors; that thereafter, being unable to pay the United States District Clerk for a transcript, and to pay costs of printing and other expenses incident to his appeal, he filed his paupers oath and petition to the United States Circuit Court of Appeals for the Fifth Circuit, seeking to prosecute his appeal in forma pauperis; the United States District Attorney seasonably filed his motion to dismiss the appeal on the grounds that no transcript of the record and no brief had been filed, and that petitioner had not paid the costs incident to the appeal, and that petition for permission to prosecute appeals in forma pauperis should be denied on the grounds the appeal was without merit.

The motion was set down for hearing before the United States Circuit Court of Appeals for the Fifth Circuit at its November (1942) Term at Fort Worth, Texas, and was orally argued, and on November 21st, 1942, the Court rendered its opinion dismissing the appeal, solely on the grounds that the sentence entered on April 23rd, 1942, could not be appealed from, that petitioner should have instituted his appeal within five days from the date of his

original conviction, June 16th, 1937, and denied permission to prosecute appeal in forma pauperis, copy of which said opinion is here brought forth and appears in Appendix.

Petitioner duly and timely filed his petition for rehearing, and on the 23rd day of December, 1942, the Court overruled same without written opinion; that upon petitioner's petition, timely filed, the United States Circuit Court of Appeals for the Fifth Circuit, stayed issuance of mandate herein for thirty days from December 23rd, 1942, to allow him to prosecute this petition for certiorari to this Honorable Court.

Statement as to Jurisdiction

Petitioner appealed from the conviction and sentence imposed on June 23rd, 1942, to the United States Circuit Court of Appeals for the Fifth Circuit and on November 21st, 1942, that Court Dismissed the appeal, and on December 23rd, 1942, denied, without written opinion, petition for rehearing.

Jurisdiction is conferred upon the Supreme Court in this cause by Section 347a Title 28, U. S. C. A., and by Rule 35 (B) of the Supreme Court of the United States, which provides as one of the reasons for the granting of writs of certiorari is where the Circuit Courts of Appeal have "decided an important question of Federal law which has not been, but should be, settled by this Court."; and

by Rule 36, providing that "public interest will be promoted by prompt settlement in this Court of the questions involved" in this cause.

Questions Presented

1. Whether one who was convicted June 16th, 1937, given a suspended sentence with impossible conditions, may appeal from an entirely new and different judgment entered April 23rd, 1942, imposed after ones admitted inability to comply with conditions of the suspended sentence imposed June 16th, 1937.

2. Whether an indictment alleging that the defendant sold gasoline to purchasers thereof who were not "producers of gasolene", and thereby became indebted to the Governdment for taxes thereon, is supported by testimony that all the gasoline so sold and set out in the indictment was actually sold to "producers of gasoline," for resale, when the Statute, under which prosecution was brought, specifically exempts the defendant from payment of taxes under such transactions.

3. Whether, where indictment alleges taxes to be due on gasoline sold by a refiner to persons "not producers of gasoline" for resale, it is error of a substantial nature to admit testimony of such purchasers of such gasoline, all of whom were actually "producers of gasoline," buying it for resale, that their companies had paid the taxes to petitioner, but he had not remitted same to the Government.

4. Whether a bookkeeper of a defendant, admitting no other position of control or management or authority, other than to keep books, may bring books and records of the defendant into Court and give damaging testimony against him from such books and records without his permission, and where no search warrant has been issued and served.

5. Whether an indictment charging two separate and distinct offenses in single counts is subject to specific demurrers filed on account of its duplicity.

Reasons Relied Upon for Allowance of Writ

1. The United States Circuit Court of Appeals for the Fifth Circuit dismissed this appeal solely on the grounds that the appeal was without merit, in that it was not timely brought. There was no contention that appellant's petition to prosecute his appeal in forma pauperis was not otherwise meritorious. Neither did they pass upon the errors assigned in the trial of the cause. That Honorable Court cites Rule III for Criminal Procedure, following 728 U. S. C. A., following Section 23a, now Title 18, Sec. 688, U. S. C. A., as reasons for dismissal. Petitioner urges that under that Rule, he is entitled to bring his appeal, in that, although it was based on a conviction had June 16th, 1937, the sentence imposed on April 23rd, 1942, may be appealed from. It was a new, separate, distinct and final judgment, regardless of the time of the conviction upon which that judgment was based.

The Circuit Court of Appeals cites also certain cases upon which they relied in dismissing the appeal. They cite *Kinney vs. Plymouth Rock Squab Co.*, 236 U. S. 43, a civil case bearing on prosecution of cases in forma pauperis. Petitioner admits the soundness of the theory that a case without merit should not be allowed to be prosecuted in forma pauperis. However, that Court cites *Fewox vs. U. S.*, 77 F. (2) 688; *Miller vs. U. S.*, 104 F. (2), 343; *U. S. vs. Tousey*, 101 F. (2) 892, in support of its decision that petitioner cannot appeal from the judgment entered April 23rd, 1942. Petitioner respectfully urges that none of these cases are in point with this one. No question of a suspended sentence, later revoked, is raised in these cases. Each of them simply cite instances where appellants did not file their notices of appeal five days from the date of conviction and sentence. This particular question has not been passed upon by this Court.

2. and 3. The indictments in this case, consolidated, specifically allege that petitioner, a refiner of gasoline, was bounden to pay to the Government one cent per gallon on all gasoline manufactured and sold by him, and that as such, he sold certain gasoline set out in the indictment to purchasers thereof, who were not "producers of gasoline" and, thereby, exempt from the payment of such tax, whereas in truth and in fact, every sale proved was made to "producers of gasoline" for resale, and were, thereby (under Title 26, Sec. 3412 U. S. C. A.) exempt from the payment of such taxes. The Government

sought to justify this allegation and proof upon the theory that such purchasers of gasoline remitted to peteitioner for the taxes, and simply that petitioner failed to remit it to the Government. Of course, it is a violation of the laws of the United States for one to come into possession of moneys belonging to the Government, fail and refuse to remit it to the proper authorities and to appropriate it to ones own use and benefit, but he cannot be convicted for this offense under an indictment charging him with the offense described under the statute above cited, and under which this prosecution was brought.

4. The admission of the testimony of Sid B. Pope, taken from the books and records of petitioner, tending to incriminate petitioner, where it is admitted that Pope had no authority except that as a bookkeeper and auditor, and that he had no permission from petitioner to so bring and produce his books and records, is clearly in violation of the Fifth Amendment to the Constitution and all of the almost sacred opinions of this Court from its inception.

5. Petitioner urges that where an indictment is so faulty as to attempt to charge two offenses in single counts it is not within the discretion of the Court to overrule a demurrer and motion to quash. He believes that the indictment is fundimentally bad.

Wherefore, your petitioner respectfully prays that writ of certiorari issue to the Honorable, the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to command the United States District Clerk

for the Northern District of Texas to prepare and certify to that Court transcript of the record of the proceedings of the Trial Court and such other matters as pertain to this cause, and upon receipt thereof from said Trial Court the said the Honorable Circuit Court of Appeals for the Fifth Circuit to certify to this Court for its review and determination on a day certain a full and complete transcript of the record and proceedings in the cause numbered and entitled on its docket No. 10310, *W. L. Nix vs. United States,* and that the judgment of the Circuit Court of Appeals dismissing this appeal be reversed, and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem proper.

EUSTIS MYERS,
Dallas, Texas
Counsel for Petitioner

HOWARD DAILEY,
Of Counsel.

APPENDIX

In the

United States Circuit Court of Appeals

For the Fifth Circuit

No. 10310

W. L. NIX, *Appellant.*

versus

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the District Court of the United States for the Northern District of Texas

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Before SIBLEY and McCORD, Circuit Judges, and DAWKINS, District Judge.

BY THE COURT: The appellant was convicted June 21, 1937, and sentenced to pay a fine of $10,000.00 and to serve ten years in the penitentiary, and the execution of the imprisonment sentence was suspended and appellant put on probation. On April 23, 1942, his probation was revoked and the imprisonment sentence was reduced to two years.

The next day he filed a notice of appeal to this Court, stating as grounds of appeal only rulings made during the trial in 1937. No record on appeal was ever prepared and filed in this Court. On the call of the case on November 4, 1942, the United States moved to dismiss the appeal. The appellant moved to be allowed to prosecute the appeal in froma pauperis and for further time to prepare the record.

The statute, *28 U. S. C. A.* Sec. 832, permits the trial court to prevent an appeal in forma pauperis by a certificate in writing that in its opinion the appeal is not taken in good faith. Ordinarily application ought to be made to the trial court, that opportunity may be given the trial court so to certify. But the appellate court also can grant an appeal in forma pauperis, but the grant rests in the discretion of the court, and will be denied if the appeal appears not to be meritorious. *Kinney v. Plymouth Rock Squab Co.*, 236 U. S. 43. The present appeal is without merit. Every ground urged relates to the trial in 1937. The judgment of conviction occurred then, and an appeal from it must, under the Rule III for Criminal Procedure, 728 U. S. C. A. following Sec. 23(a), be taken within five days, unless a motion for new trial be made. *Fewox v. United States*, 77 F. 2d 688; *Miller v. United States*, 104 F. 2d 343; *United States v. Tousey*, 101 F. 2d 892. No provision is made for delaying appeal because of the putting of the defendant on probation. Probation does not set aside the judgment of conviction, but itself involves a judgment of

conviction, even when the imposition of sentence is suspended, because probation can only be visited on a convict, and is itself a form of mild punishment. *Cooper v. United States*, 91 F. 2d 195. If the probated convict is dissatisfied at his conviction he can and must appeal at once. This appellant is far too late. The appeal being without merit, the application to prosecute it in forma pauperis is denied. The appeal itself is dismissed for want of prosecution.

(2)

In the

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OCTOBER TERM, 1942

No. 664

W. L. NIX

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THE UNITED STATES OF AMERICA

BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

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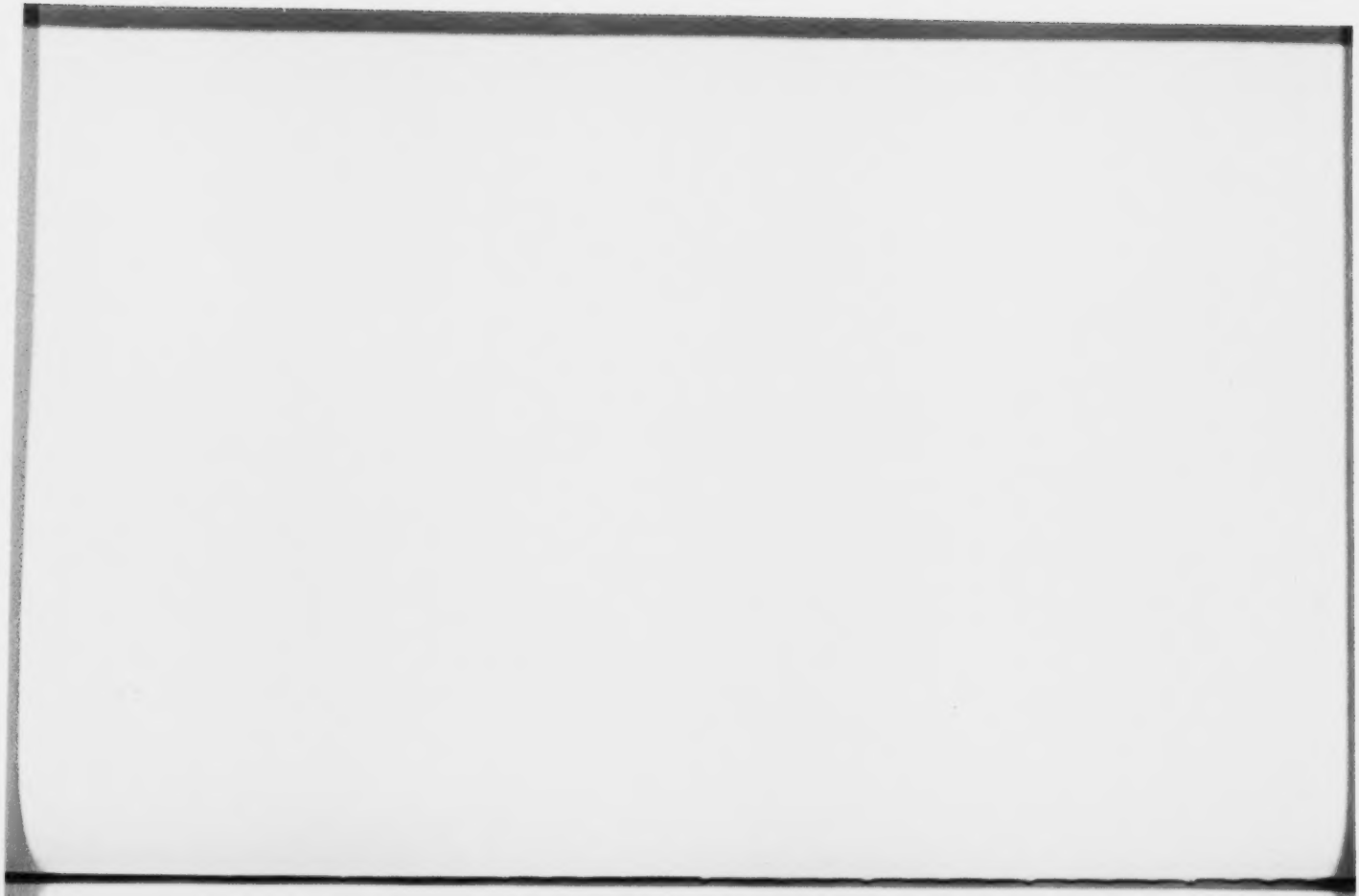

In the

Supreme Court of the United States

OCTOBER TERM, 1942

No. 664

W. L. NIX

vs.

THE UNITED STATES OF AMERICA

SUPPORTING BRIEF

To the Honorable, the Supreme Court of the United States:

1

Opinions of the Courts Below

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit will be found in the appendix hereto; the trial court filed no opinion.

2

Jurisdiction

(a) The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, appearing in the appendix hereto, was handed down November 21st, 1942, and petition for rehearing was denied December 23rd, 1942, without written opinion.

(b) This Court has jurisdiction under Title 28, Sec. 347 (a), U. S. C. A., and should take cognizance of this case under Rule 35 B of the Rules of the United States Supreme Court, and under Rule 36 thereof.

On February 16th, 1937, there was returned into the United States District Court for the Northern District of Texas, Dallas Division, Indictment No. 8920, charging petitioner in 34 counts with having wilfully and unlawfully attempted to defeat and evade payment of the taxes on gasoline manufactured by him, and with having wilfully and unlawfully failed and refused to pay such taxes, in violation of Section 3412, Title 26, U. S. C. A., and No. 8922, charging petitioner and Sid B. Pope with having violated the same statute, laws, and regulations thereunder, in 14 Counts.

The even counts of each of these indictments attempt to charge the wilful and unlawful failure and refusal to pay taxes due, and the odd counts charge the wilful and

unlawful attempt to defeat and evade such payments. Each of the odd counts of the indictment, while attempting to charge such attempt to defeat and evade payment of the taxes due, charge also the wilful and unlawful failure and refusal to pay same, thereby charging two distinct and separate offenses in the same Counts of the indictments. Each and every count of the indictments allege that the gasoline manufactured and sold by petitioner, upon which the taxes became due, was sold to persons, not within the excepted classes to whom gasoline might be sold tax free, towit, "a producer of gasoline", but did not plead such gasoline was not sold to numerous of the other excepted classes of persons.

Appellant seasonably and timely filed his general and special demurrers to each of the indictments, and moved to quash each of them and each count of them alleging, among other things, that the odd counts of each of them were duplicitious, in that each of such odd counts attempt to charge two offenses, towit, the wilful and unlawful attempt to defeat and evade the payment of the taxes alleged to have been due, and the wilful failure and refusal to pay such taxes; urging also in his said demurrer, petitioner set out that there was a fatal misjoinder of offenses in each of said indictments in that Counts 1 to 14 allege such violation by petitions while operating Texas Refinery; Counts 15 and 16 charge such violations operating Texas Refinery, Adams Oil Co., lessee; counts 17 and 18 charge such violations operating A. J. Adams Oil Co.,

Texas Plant; Counts 19 to 22, inclusive, charge such violation while operating Keystone Refinery; Counts 23 and 24 charge such violations operating Keystone Refinery, Adams Oil Co., lessee; Counts 25 and 26 charge such violations by operation of Triangle Refinery, Adams Oil Co., lessee; counts 27 and 28 charge such violations while operating A. J. Adams Oil Company, Triangle Refinery; and Counts 31 to 34, inclusive, charge such violations while operating Adams Oil Company, Big Sand Plant, with no allegations (which also were not proved during the trial) of common ownership and control, and petitioner alleged in his said demurrer and motion to quash that each of the violations alleged to have been committed by petitioner in the operation of the separate and distinct refineries, if committed at all, were separate and distinct offenses, and not so connected together as would permit their prosecution in one indictment, all of which were by the Court overruled, and petitioner then and there excepted. At the close of the Government's case upon the trial, and when both sides had closed, petitioner renewed each of his demurrers and motions to quash, which were again overruled, and to which petitioner again duly excepted.

The case was called for trial on June 14th, 1937, the indictments, Nos. 8920 and 8922, were consolidated as to petitioner, since that at a previous term of this Court Sid B. Pope had entered his plea of guilty to the offenses charged in cause No. 8922, and had been given eighteen months in the United States Penitentiary at Leavenworth,

Kansas, suspended for two years, conditioned upon good behavior, and only petitioner remained to be tried. On the 16th day of June, 1937, petitioner was convicted on each and every count of the indictments, consolidated, and was by the Court sentenced to pay a fine of $10,000.00 on Counts 2, 4, 6, 8, and 10, and to serve Five years in the United States Penitentiary at Leavenworth, Kansas on the remaining counts, generally, the five years to be suspended, conditionsed (1) good behavior; (2) the payment of $5,000.00 of the fine within 90 days; (3) remaining $5,000.00 in 18 months; (4) the payment to the Government of the taxes alleged to be due (some $84,000.00 plus penalties and interests) within eighteen months.

At the close of the Government's case, after having renewed his general and special demurrers and motions to quash, as above set out, petitioner moved for an instructed verdict of not guilty, for the reasons that (1) there was a fatal variance between the allegations and proof, in that it was alleged in the indictment that petitioner sold gasoline set out in the indictment to persons not within the excepted classes towit, "producers of gasoline", whereas, in truth and in fact, each and every sale alleged to have been made by petitioner upon which he owed taxes had been sold to "producers of gasoline" for resale, and such transactions were exempt from the payment of the taxes; and (2) because the law under which petitioner was being tried (Sec. 3412, Title 26, U. S. C. A.) exempted petitioner from the payment of taxes on these sales. Although each and

every witness produced by the government to testify of the sales of gasoline upon which taxes alleged to have been due, and of which petitioner was charged with having attempted to defeat and evade and with having wilfully failed and refused to pay, testified such gasoline had been sold to "a producer of gasoline" for resale, the Court overruled the motion, which was renewed when defendant had rested his case, and when both sides had closed, which was also overruled, to all of which appellant then and there duly excepted; the evidence tended to show that petitioner had collected certain of the taxes from the purchasers thereof when the gasoline was sold which were not remitted to the Government but, if he had so done, that would constitute a separate and distinct offense, not charged in the indictment, to the offenses for which petitioner had been indicted and was being tried.

Upon the trial of the case, the Government tendered as certain of its witnesses, Ben P. Pipgrass, E. S. Horner, Ballard Clark, John Stephens, and E. P. Harvey, being the witnesses who had purchased, or had represented the purchasers, of all the gasoline alleged in the indictments, consolidated, to have been sold by petitioner upon which he was alleged to have attempted to defeat and evade payment of the taxes due thereon and which he was alleged to have wilfully failed and refused to pay, and having been examined on voir dire by petitioner under permission of the Court, all testified that they were "producers of gasoline" or represented "producers of gasoline" in their

respective purchases of gasoline from petitioner, and that the gasoline so purchased was purchased for resale; petitioner objected to the testimony of each of these witnesses, for the reason that they were "producers of gasoline", that the gasoline purchased from petitioner by them was purchased for resale, and, therefore, these transactions were exempt from the payment of such taxes by petitioner, such testimony was irrelevant, immaterial, prejudicial and contrary to the allegations contained in the indictment, which objections were by the Court overruled, and to which action the defendant then and there excepted.

Also upon the trial of this cause, the Government called as one of its witnesses, Sid B. Pope, joint defendant with petitioner in cause No. 8922, consolidated, who testified that he was head bookkeeper and auditor for petitioner for a while; that he had in his possession certain books and records belonging to petitioner, that his duties only was to keep books and serve as auditor for petitioner, that his duties went no further, and that he had nor did he exercise any control over the business or policies of the companies operated by petitioner. Having been permitted to be examined by petitioner on voir dire, he testified further that petitioner did not give him his permission to take and produce such books and records, and that no search warrant had been issued to seizze them, he nevertheless was permitted, over the objection of petitioner, to testify that certain of the books and records he had in his possession

showed certain gasoline taxes due by petitioner that had not been paid.

Petitioner was unable to meet the conditions of his suspended sentence, and after various delays and extensions of time within which he might do so, a part of which time, petitioner was a fugitive from the jurisdiction of the Court, he voluntarily appeared before the Trial Court on April 23rd, 1942, admitted his inability to so comply, and was sentenced to two years confinement in the United States Penitentiary at Leavenworth, Kansas, with no fine, no provisions as to the payment of taxes, and without further suspended sentence; that immediately upon the so sentencing of petitioner, the Honorable T. Whitfield Davidson, United States District Judge for the Northern District of Texas, who had presided over petitioner's trial, and who had meted out all sentences, left for Washington, D. C., for an extended time to hold Court in the District of Columbia; that appellant, in due time after the sentnece imposed on April 23rd, 1942, appealed his case to the United States Circuit Court of Appeals for the Fifth Circuit, and consulted with and received orders from that Court with reference to the perfection of his appeal instead of the Trial Court, who was away; that in due time and within the time allowed him by the Circuit Judges, he prepared and filed his bill of exceptions and assignment of errors; that thereafter, being unable to pay the United States District Clerk for a transcript, and to pay costs of printing and other expenses incident to his appeal, he filed his

paupers oath and petition to the United States Circuit Court of Appeals for the Fifth Circuit, seeking to prosecute his appeal in forma pauperis; the United States District Attorney seasonably filed his motion to dismiss the appeal on the grounds that no transcript of the record and no brief had been filed, and that petitioner had not paid the costs incident to the appeal, and that petition for permission to prosecute appeals in forma pauperis should be denied on the grounds the appeal was without merit.

The motion was set down for hearing before the United States Circuit Court of Appeals for the Fifth Circuit at its November (1942) Term at Fort Worth, Texas, and was orally argued, and on November 21st, 1942, the Court rendered its opinion dismissing the appeal, solely on the grounds that the sentence entered on April 23rd, 1942, could not be appealed from, that petitioner should have instituted his appeal within five days from the date of his original conviction, June 16th, 1937, and denied permission to prosecute appeal in forma pauperis, copy of which said opinion is here brought forth and appears in Appendix.

Petitioner duly and timely filed his petition for rehearing, and on the 23rd day of December, 1942, the Court overruled same without written opinion; that upon petitioner's petition, timely filed, the United States Circuit Court of Appeals for the Fifth Circuit, stayed issuance of mandate herein for thirty days from December 23rd, 1942,

to allow him to prosecute this petition for certiorari to this Honorable Court.

4

Specifications of Error

(a) The Trial Court erred in failing and refusing to sustain petitioner's general and special demurrers to the indictment, presented and urged, timely, proir to petitioner's plea thereto, and renewed at the close of the Government's case, and when both sides had rested, because said indictments were duplicitious, in that the counts thereof, contained two separate and distinct offenses, pleaded in same counts.

(b) The Trial Court erred in failing and refusing to instruct a verdict of not guilty, timely sought by petitioner after the Government rested its case and when both sides had rested, for the reason that the indictment alleged in each of their counts, that petitioner had sold gasoline to persons "other than producers of gasoline" upon which he owed the Government one cent per gallon as taxes, whereas the proof showed that all gasoline sold by petitioner was sold to producers of gasoline for resale, and was, therefore, exempt from the payment of such taxes.

(c) The Trial Court erred in failing and refusing to sustain petitioner's objection to the damaging testimony of Sid B. Pope, who was permitted to produce certain documents belonging to petitioner and testify therefrom after

it had been shown that petitioner did not give the witness, or any one else, permission to so produce same and that no search warrant was issued to seize same.

(d) The Circuit Court erred in dismissing petitioner's appeal without reviewing the record on the grounds that petitioner was convicted June 21st, 1937, and did not file his notice of appeal until April 28th, 1942, for the reason that, upon his conviction on June 21st, 1937, petitioner was sentenced to a fine of Ten Thousand Dollars, to serve Five Years in the United States Penitentiary at Leavenworth, Kansas, suspended, conditioned that he pay Five Thousand Dollars of the fine within ninety days, the remainder of the fine and all taxes alleged to be due by petitioner ($86,000.00 plus penalties and interest) within eighteen months from the date of conviction, and that, after various delays and extensions, the suspended sentence was revoked, the trial court entered an entirely new and final judgment, in which he sentenced petitioner to serve two years in the United States Penitentiary at Leavenworth, Kansas, with no fine and with no provisions of payment of taxes, and petitioner duly and seasonaly filed and duly prosecuted his notice of appeal within five days from the date of this last and final judgment.

Argument

(1) STATEMENT. Petitioner is much handicapped in presenting this case to this Honorable Court, for the

reason that, after his conviction herein, and for a long time prior thereto, he was a pauper, within the meaning of the statute, and while he secured the money to pay for the court reporter's preparation of his bills of exception, he has never been able since to pay for a transcript, printing of the record, and payment of costs incident to his appeal. Therefore, he is unable to refer to any record of the proceedings, but is merely able to present such matters as the faith of this Honorable Court in his counel's integrity will permit.

(2) DUPLICITY OF INDICTMENT. Each of the odd counts of the indictments, consolidated, attempt to charge petitioner with having attempted to defeat and evade the payment of taxes due on gasoline manufactured and sold by him, a separate and distinct offense, and with having wilfully and unlawfully failed and refused to pay such taxes, also a separate and distinct offense. Petitioner recognizes the broad discretion of the trial court, but urges that to allow the pleader to charge two separate and distinct offenses in the same counts of indictments is so far afield from the recognized practice of pleading that the trial court cannot, within his sound discretion, let such things go without notice.

(3) INSUFFICIENCY OF THE EVIDENCE. The indictments in this case, consolidated, specifically alleged that petitioner manufactured and sold the gasoline upon which he attempted to defeat and evade the taxes due and upon which he wilfully and unlawfully failed and refused to

pay, to persons "other than producers of gasoline for resale", whereas, in truth and in fact, every witness produced by the Government who had purchased such gasoline, testified that they were "producers of gasoline" and had bought the gasoline from petitioner for resale, and had actually resold it to the general public in their respective capacities of sellers and distributors of gasoline. *The record unquestionably shows this.*

The Government sought to justify its position on the theory that such purchasers, who, under the regulations issued by authority of the Act Of Congress under which the indictments were brought (Title 26, Sec. 3412, U. S. C. A.) provided that such purchasers might either buy it tax free from the original producer and pay such taxes themselves, or that they might pay the taxes to the original producer and sell it tax free to the public, and in the case at bar, such purchasers had actually paid the taxes to petitioner, and that petitioner had failed and refused to remit it to the Government. Petitioner admits this to be the law under such regulations issued, but he was indicted for having sold gasoline to persons other than "producers of gasoline for resale", and that, therefore, was guilty of the offense charged. Admitting all the contention of the Government to be true, yet it remains that petitioner could not be convicted for the offenses charged in the indictment under the evidence produced by the Government. No doubt, under the Government's theory of the case, petitioner was guilty of some offense, but certainly not of having sold

gasoline to persons "other than producers of gasoline for resale." This is so evident, petitioner deems it unnecessary to pursue this point further.

(4) SEARCH AND SEIZURE. Sid B. Pope was indicted jointly with petitioner in cause No. 8922, but not in cause No. 8920, with which 8922 was consolidated, and his cause had been disposed of at a previous term of court, wherein the said Sid B. Pope had received a suspended sentence of eighteen months in the United States Penitentiary at Leavenworth, Kansas, and was, at the time of his testimony, for the purpose of the record and under the law, merely a witness for the Government. He testified that he had served for a while as bookkeeper for petitioner, that he had no other authority, that he owned no interest in petitioner's refineries, that his connection with petitioner's business had long ago ceased, that petitioner did not give him any authority to produce his books and records into court, nor was he producing them under any writ or authority of the court, yet he was permitted, over the timely objection of petitioner, to testify from such books and records to the effect that such books and records showed a large amount of gasoline had been manufactured and sold by petitioner upon which petitioner had not paid the taxes alleged to have been due. Petitioner respectfully urges that this was clearly in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

(5) TIMELINESS OF APPEAL. Petitioner was originally convicted in this cause June 21st, 1937, and was sentenced by the court to pay a fine of Ten Thousand Dol-

lars and to serve five years in the United States Penitentiary at Leavenworth, Kansas, the imprisonment suspended, conditioned that petitioner pay Five Thousand Dollars of the fine 90 days from that date, and pay the remaining Five Thousand Dollars and all taxes alleged to be due (approximately $134,000.00, including penalties and interest) within eighteen months. After various extensions and delays, and on April 23rd, 1942, petitioner voluntarily appeared in the United States District Court for the Northern District of Texas, admitted his inability to comply with the provisions of this suspended sentence, and the trial court entered a new, separate, and distinct judgment from the one originally entered, and sentenced petitioner to serve two years in the United States Penitentiary at Leavenworth, Kansas, with no fine and with no provisions as to the payment of the taxes alleged to have been due.

From the last and final judgment, petitioner duly and seasonably prosecuted his appeal to the United States Circuit Court of Appeals for the Fifth Circuit, and that Court dismissed his appeal on the grounds that such appeal was not timely taken, as will more fully appear in its opinion in the appendix hereto.

Petitioner admits that this Honorable Court has held that one may appeal from a judgment of a trial court upon which a conviction was had but sentence suspended, although up to the time this Court so ruled, several circuit courts of appeal had held that such could not be done on the grounds that there was no final judgment from which to appeal. However, this Court has not said that one might

not wait until his suspended sentence is changed and put into effect and then appeal. Petitioner earnestly urges that the judgment of conviction entered in his cause on April 23rd, 1942, being a new, separate, and distinct judgment from that entered September 21st, 1937, is appealable from, and that having diligently prosecuted his appeal from that sentence, it was error for the Circuit Court to so dismiss his appeal. He further urges that the cases cited by the Circuit Court have no application to the points involved in his case, and the questions here presented, not having been passed upon and settled by this Honorable Court, are of such importance as to highly justify the granting of this writ.

As has been referred to in his petition for this writ, petitioner is a pauper and filed his pauper's oath before the United States Circuit Court of Appeals and in this Court, along with his petition for certiorari, and earnestly desires to be permitted to prosecute this writ, and to be allowed to amend his brief after the record shall have been ordered and prepared, but, under the present status of the record, can do no more than briefly call this Honorable Court's attention to the errors complained of, which, petitioner alleges, certainly affected his substantial rights.

Respectfully submitted,

EUSTIS MYERS,
Counsel for Petitioner.

HOWARD DAILEY,
Of Counsel.

APPENDIX

In the

United States Circuit Court of Appeals

For the Fifth Circuit

No. 10310

W. L. NIX, *Appellant.*

versus

UNITED STATES OF AMERICA, *Appellee.*

Appealed from the District Court of the United States for the Northern District of Texas

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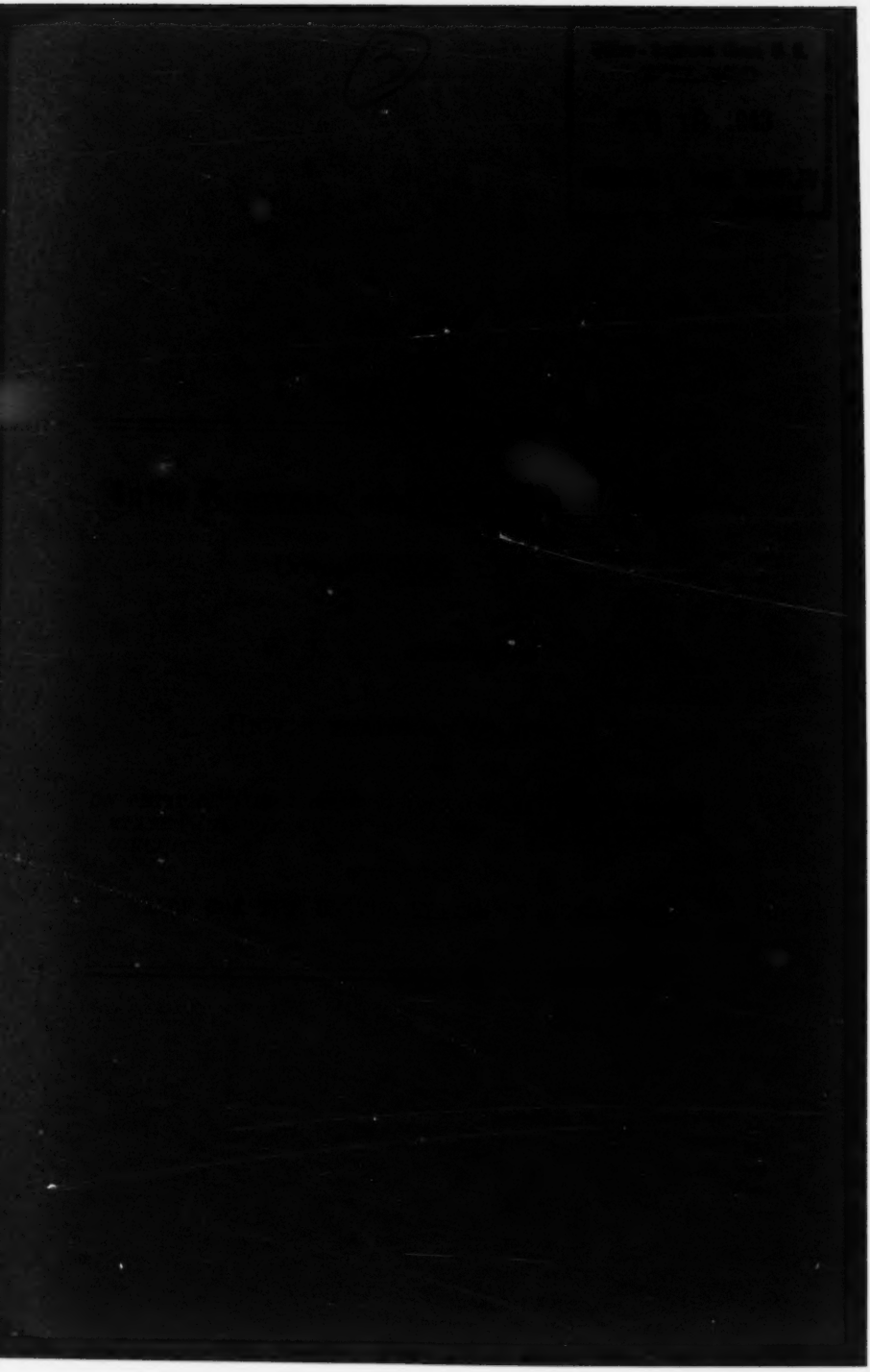
Before SIBLEY and McCORD, Circuit Judges, and DAWKINS, District Judge.

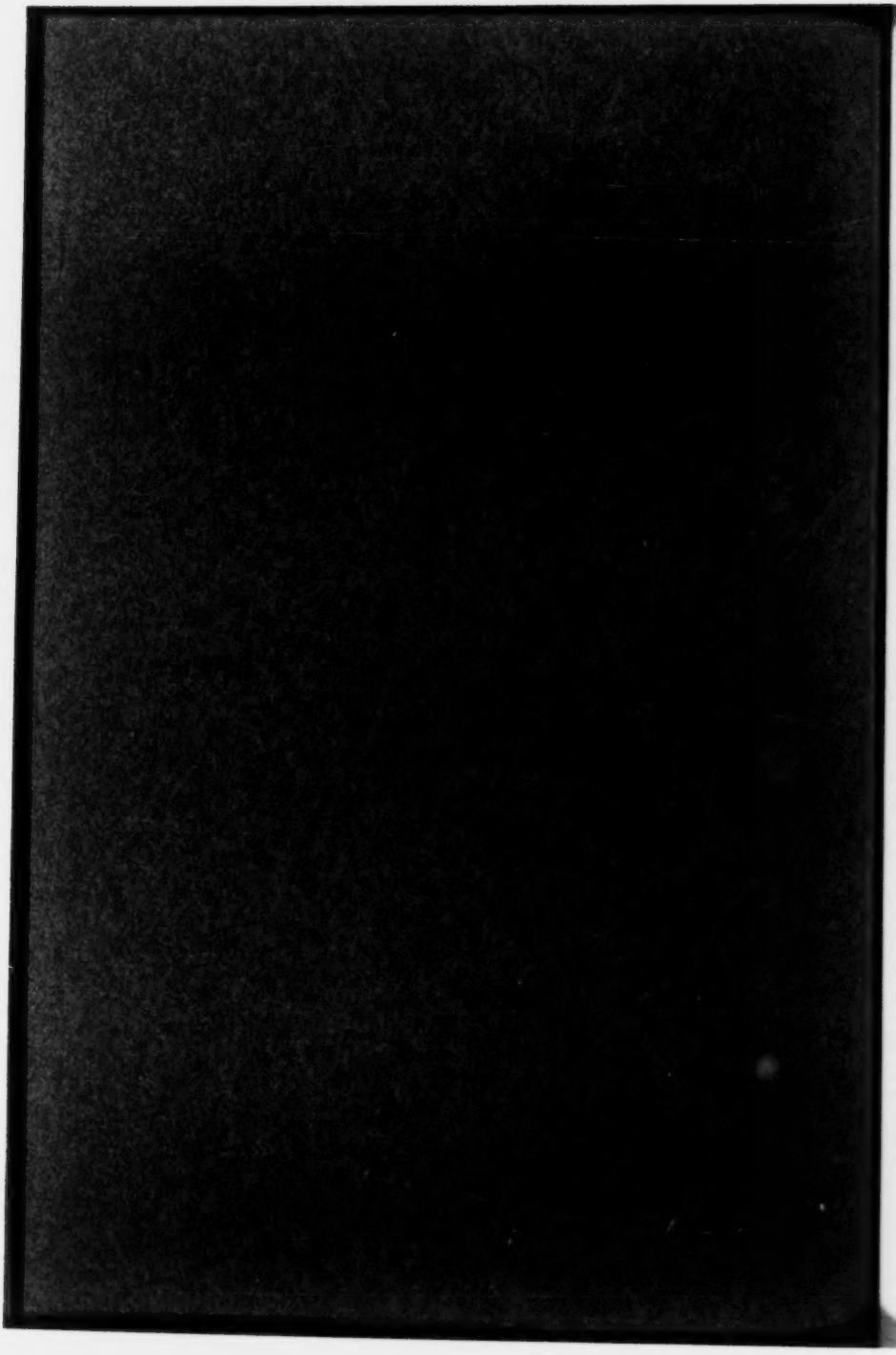
BY THE COURT: The appellant was convicted June 21, 1937, and sentenced to pay a fine of $10,000.00 and to serve ten years in the penitentiary, and the execution of the imprisonment sentence was suspended and appellant put on probation. April 23, 1942, his probation was revoked and the imprisonment sentence was reduced to two years. The next day he filed a notice of appeal to this Court,

stating as grounds of appeal only rulings made during the trial in 1937. No record on appeal was ever prepared and filed in this Court. On the call of the case on November 4, 1942, the United States moved to dismiss the appeal. The appellant moved to be allowed to prosecute the appeal in forma pauperis and for further time to prepare the record.

The statute, *28 U. S. C. A.* Sec. 832, permits the trial court to prevent an appeal in forma pauperis by a certificate in writing that in its opinion the appeal is not taken in good faith. Ordinarily application ought to be made to the trial court, that opportunity may be given the trial court so to certify. But the appellate court also can grant an appeal in forma pauperis, but the grant rests in the discretion of the court, and will be denied if the appeal appears not to be meritorious. *Kinney v. Plymouth Rock Squab Co.*, 236 U. S. 43. The present appeal is without merit. Every ground urged relates to the trial in 1937. The judgment of conviction occurred then, and an appeal from it must, under the Rule III for Criminal Procedure, 728 U. S. C. A. following Sec. 23(a), be taken within five days, unless a motion for new trial be made. *Fewox v. United States*, 77 F. 2d 688; *Miller v. United States*, 104 F. 2d 343; *United State v. Tousey*, 101 F. 2d 892. No provision is made for delaying appeal because of the putting of the defendant on probation. Probation does not set aside the judgment of conviction, but itself involves a judgment of conviction, even when the imposition of sentence is sus-

pended, because probation can only be visited on a convict, and is itself a form of mild punishment. *Cooper v. United States*, 91 F. 2d 195. If the probated convict is dissatisfied at his conviction he can and must appeal at once. This appellant is far too late. The appeal being without merit, the application to prosecute it in forma pauperis is denied. The appeal itself is dismissed for want of prosecution.





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CITATIONS

511477—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 664

W. L. NIX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals is reported in 131 F. (2d) 857. The district court rendered no opinion.

JURISDICTION

The order of the circuit court of appeals dismissing the appeal was entered November 21, 1942. A petition for rehearing was denied December 23, 1942. The petition for a writ of certiorari was filed January 20, 1943. The juridiction of this Court is invoked under Section 240 (a) of

the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether on appeal from an order revoking probation the defendant may secure reversal of the judgment of conviction, entered four years earlier, for errors during the trial.

STATUTE INVOLVED

Act of March 4, 1925, c. 521, 43 Stat. 1259, as amended by the Act of June 16, 1933, c. 97, 48 Stat. 256:

> SEC. 2. That when directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.
>
> At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest, which warrant may be executed by either the probation officer or the United States marshal of either the district in which the probationer was put upon probation or of any district in which the probationer shall be found and, if the probationer shall be

so arrested in a district other than that in which he has been put upon probation, any of said officers may return probationer to the district out of which such warrant shall have been issued. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

STATEMENT

Petitioner was named defendant in two bills of indictment returned on February 16, 1937, in the Northern District of Texas on charges of attempting to defeat and evade gasoline excise taxes and wilfully failing to pay those taxes in violation of Section 1114 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 116.[1] The indictments, containing 34 counts in all, were consolidated. Petitioner was tried before a jury and was found guilty on

[1] No record has been filed by petitioner. Since, for reasons stated in the Argument, the court below had no jurisdiction to consider the questions sought to be raised by the appeal, we have considered it unnecessary to attempt to procure and make up a record showing the proceedings. The above Statement is taken from the petition and the opinion below.

all counts on June 16, 1937. On June 21, 1937, he was sentenced to pay a fine aggregating $10,000 on the even numbered counts and to a term of five years' imprisonment at Leavenworth Penitentiary on the odd numbered counts. The court suspended the prison sentence and placed the petitioner on probation for a period of five years, subject to the conditions, first, of good behavior, second, that half of the fine be paid within ninety days and the balance within eighteen months, and, third, that the taxes due the Government be paid within eighteen months.

Petitioner filed a notice of appeal on June 26, 1937, but abandoned that appeal.

Petitioner failed to comply with the usual conditions of probation and became a fugitive from justice. In April 1942 he was apprehended and on April 23, 1942, he was brought before the district court. The court, upon a proper showing that petitioner had complied with none of the conditions of probation, revoked the probation, reduced the term of imprisonment from five to two years, and ordered petitioner committed.

On April 24, 1942, petitioner filed notice of appeal to the Circuit Court of Appeals for the Fifth Circuit, and moved to prosecute the appeal *in forma pauperis*. The only grounds of appeal stated in the notice were rulings at the original trial which ended in the judgment entered more than four years before. The circuit court of appeals held that the appeal was without merit,

denied the motion to prosecute *in forma pauperis* and dismissed the appeal.

ARGUMENT

The action of the circuit court of appeals was clearly correct. The judgment entered on June 21, 1937, imposing sentence and placing petitioner on probation, was final and appealable. *Berman* v. *United States,* 302 U. S. 211. Petitioner's appeal, taken on April 24, 1942, was in substance an attempt to appeal from that judgment; the grounds stated in the notice of appeal relate exclusively to the proceedings determining his guilt. But, since the five day period for appeal fixed by Rule III of the Criminal Rules had expired long before the appeal was taken, the judgment of conviction was beyond the jurisdiction of the circuit court of appeals to review. *Miller* v. *United States,* 104 F. (2d) 343 (C. C. A. 5), certiorari denied, 308 U. S. 549; *Burr* v. *United States,* 86 F. (2d) 502 (C. C. A. 7), certiorari denied, 300 U. S. 664; *Dembrofsky* v. *United States,* 86 F. (2d) 677 (C. C. A. 1) ; *Fewox* v. *United States,* 77 F. (2d) 699.

Confined to the order revoking probation, there was no merit in the appeal. Probation is concerned with the rehabilitation of one convicted of crime, and not with the determination of guilt. The considerations involved in granting or revoking probation are entirely apart from any reexamination of the merits of the litigation.

Berman v. *United States, supra,* 213. Consequently, an appeal from an order revoking probation raises only the question whether the discretion of the trial court was abused. *Burns* v. *United States,* 287 U. S. 216, 222–223; *Escoe* v. *Zerbst,* 295 U. S. 490, 492. Petitioner did not contend that an abuse occurred in the instant case; and, of course, on that issue any error in rulings during the trial would be irrelevant.[2]

CONCLUSION

The decision of the court below is in all respects correct. There is presented neither an important question of law nor a conflict of decisions. It is, therefore, respectfully submitted that the petition should be denied.

CHARLES FAHY,
Solicitor General.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
GERALD L. WALLACE,
HOWARD G. CAMPBELL,
Special Assistants to the Attorney General.

ARCHIBALD COX,
Attorney.

FEBRUARY 1943.

[2] We believe that no error occurred and that petitioner's contentions are without merit. However, since there is no jurisdiction and no record, argument upon those points would be inappropriate.

U. S. GOVERNMENT PRINTING OFFICE: 1943